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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

JACK HARDEMAN,
Petitioner,

versus

ALBERT T. WITBECK,
Respondent.

No. 503

PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

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PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Jack Hardeman respectfully shows as follows:

That in an equity suit brought by the petitioner in the district court for the western district of Louisiana, the said court decreed that the respondent was a trustee for petitioner of all the right, interest, estate and title whatever under a certain permit to prospect for oil and gas which the Secretary of the Interior had issued to the respondent in the exercise of said officer's authority under section 13 of the so-called Leasing Statute of February 25, 1920, c. 85, 41 Stat. 437, 441. The case in the district court is not reported; nor did that court file a written opinion therein; but its order for decree, and the decree, are set out at pp. 129-132 of the record.

That on the respondent's appeal to the Fifth Circuit Court of Appeals the decree aforesaid was reversed in pursuance of an opinion filed on the 17th of July 1931 (Rec. 146). Rehearing was denied by said court, without opinion, on August 12, 1931 (Rec. 166).

THE DETERMINATIVE ISSUE IN THE CASE.

The question of federal law in the resolution of which the two courts below disagreed is this: Is an application for a prospecting permit under section 13 of the so-called Leasing Statute "a mere nullity", and therefore not amendable, if without intrinsic proof that it had been executed under oath? The trial court answered that question in the negative. The appellate court below answered it in the affirmative. (Rec. 155). Although in so doing the appellate court aligned itself with the Department of the Interior in the conclusion that the respondent and not the petitioner was entitled to a permit to prospect a certain tract of land in the State of Louisiana, for oil and gas, it reached that conclusion by a process of reasoning utterly inconsistent with the reasoning to the same conclusion by the Department of the Interior. That department so concluded upon the assigned ground that a fee did not accompany the petitioner's application when filed. (Rec. 110 and 117). The appellate court below held that such a ground was an untenable one for such a conclusion. (Rec. 154). The Department of the Interior has decided that an application for a permit which is without intrinsic proof that it had been sworn to when filed may be so amended as to show that an oath thereto had been made before filing. (Allen v. Pilcher, 51 L. D. 285). But

the appellate court below held that such an administrative construction of the so-called Leasing Statute is not "practicable". (Rec. 155).

If the Interior Department was sound in its reasoning to its conclusion that petitioner's application was "a mere nullity" because it was not accompanied with the required fee when it was filed, it is unimportant that it reached that conclusion after it had rendered a decision which sustained the petitioner's applications as against the respondent's conflicting application, and declared such decision final (Rec. 85-90, especially at p. 90). In such event it would also be unimportant that such conclusion was reached upon an ex parte proceeding by the respondent and without any previous notice whatever thereof to the petitioner (Rec. 9 [par. XVI of bill], 106 and 122). But if such administrative reasoning was unsound, it was also unsound to have allowed respondent to reopen the case in the Interior Department for a hearing on questions waived by him through failure to urge or even notice them before the General Land Office or on the appeal from that office to the Secretary. In this connection there is an apt passage in the opinion of the Ninth Circuit Court of Appeals in *Mancke v. United States, 38 F. (2d) 624.*

While it is very probable that the provisions of section 763 of Title 28, USCA, as construed in the *Manke* Case, were regarded by this Court as construed correctly, and, therefore, certiorari was denied on October 13, 1930 (No. 187, October Term, 1930), nevertheless it is believed that this Court regarded as a sound exposition of law,—and will regard as pertinent in the instant case,—the fol-

lowing excerpt from the opinion delivered by Circuit Judge Dietrich in the *Mancke* Case, to wit:

> "For obvious reasons a pleading with a defective verification, or none at all, should not be treated as a nullity. One who goes to trial, apparently upon the theory of issues duly joined, will not afterwards be heard to say that there were no issues, merely because an answer, otherwise sufficient and in due form, is not properly verified. See Arrington v. Tupper, 10 Cal. 464; Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; Hill v. Nerle, 29 Cal. App. 473, 156 P. 981; In re Spinks Drug Co. (D. C.) 298 F. 307; Eckerson v. Tanney (D. C.) 235 F. 415; Griswold v. Bacheller (C. C.) 77 F. 857."
>
> See also *31 Cyc. 732.*

STATEMENT AS TO JURISDICTION.

The jurisdiction invoked by the petitioner is that conferred by section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938. Other requirements of paragraph 1 of the 12th of the rules of this Court are met by the statements of fact set out hereinbefore. The only remaining requirement of the said paragraph is inapplicable because of the absence of any substantial question as to jurisdiction by certiorari.

SUMMARY OF THE MATTER INVOLVED.

The uncontested factual considerations on which the case was presented and determined in the courts below are these:

November 11, 1923 the petitioner fulfilled the conditions precedent to the acquisition of the "preference right

over others to a permit" which section 13 of the so-called Leasing Statute, supra, defines and which lapses or terminates through failure to apply for a permit within thirty days immediately following fulfillment of the conditions. December 11, 1923 the petitioner filed an application for permit in exercise of such right. The application had in fact been executed under oath by the petitioner but did not contain intrinsic proof of having been so executed. (Rec. 13, 80-82, 121). The fee required by law to be paid in connection with the application was not paid until December 19, 1923. (Rec. 107).

After acquisition by the petitioner of the aforesaid "preference right", and on November 12, 1923, the respondent, without having fulfilled any of the conditions precedent prescribed by section 13 of the statute, and without claiming a preference right under that section, filed an application for a permit to prospect for oil and gas the same land with reference to which the petitioner had acquired a "preference right over others to a permit". The respondent's application, when filed, bore intrinsic proof that it had been executed by him under oath; and when tendered for filing was accompanied with the fee required by law. (Rec. 83-85).

The two thus conflicting applications were the subject of a decision of the General Land Office rendered January 24, 1924. Under such decision the respondent's application was rejected for the stated reason that it asserted a claim junior in right to that asserted by the petitioner under the "preference right" acquired by him (Rec. 82, 83). On appeal by the respondent to the Secretary of the Interior that officer, on April 16, 1924, affirmed the deci-

sion of the General Land Office and declared all proceedings involving the two applications finally closed (Rec. 85-90. Witbeck v. Hardeman, 50 L. D. 413). April 24, 1924 the General Land Office,—in execution of the aforesaid decision of the Secretary of the Interior,—finally rejected the respondent's aforesaid application and declared closed all proceedings involving its conflict with the applicaton by the petitioner. (Rec. 90).

October 28, 1924 there was received in the office of the Secretary of the Interior a letter from the respondent in which he brought to the attention of that officer, for the first time, the facts (a) that the petitioner's application was without intrinsic proof that it had been made under oath, and (b) that "no fees accompanied said application as required." (Rec. 104-105). On the same date the Register of the United States Land Office at Baton Rouge, Louisiana, reported to the Secretary of the Interior, by telegraph, that the fee due from the petitioner under his application was paid on December 19, 1923 (Rec. 106-107). January 3, 1925 an attorney in the District of Columbia, acting for the respondent, filed a petition for exercise of the Secretary's supervisory authority, praying for "vacation of the Departmental decision of April 16, 1924," aforesaid, in favor of the petitioner, (Rec. 106). January 12, 1925 the Secretary of the Interior, in action on such petition, decided (1st) that "his [petitioner's] failure to tender the required filing fee within thirty days from the date of the alleged posting defeated his claim of preference right," and (2d) that respondent's "application is entitled to priority" and declared "vacated" the aforesaid decision

of April 16, 1924 (Rec. 108-110. *Witbeck v. Hardeman* [on Reconsideration], *51 L. D. 36)*.

The statement of evidence under Equity Rule 75 contains this paragraph:

> "Neither Hardeman [petitioner], nor any counsel for Hardeman, nor any one authorized to appear or act on his behalf was ever served with a copy of the aforesaid petition involving the supervisory authority; and neither Hardeman, nor any counsel for Hardeman, nor any one having any authority to appear for Hardeman had any notice of the aforesaid petition, until subsequent to January 12, 1925, and after said petition had been acted upon by the Secretary of the Interior" * * * (Rec. 106. See also Rec. 9, 122 and 123).

That the oversight or inadvertence that caused petitioner's application for a permit to be without intrinsic proof of execution thereof by him under oath, was never called to his attention until notified of the aforesaid decision of the Secretary of the Interior of January 12, 1925. (Rec. 13, 121). Petitioner both moved for rehearing of the case under that decision and adduced proof before the Secretary of the Interior that petitioner's application had in fact been sworn to when filed. Upon such proof the petitioner moved for leave so to amend the application as to cause it to contain intrinsic proof that oath thereto had been made when filed. (Rec. 13, 14, 113, 114). March 5, 1925 the Secretary of the Interior denied both the motion for rehearing and the motion to amend (Rec. 114-119, *Witbeck v. Hardeman, 51 L. D. 37*) concluding thus:

> "Not being accompanied by any part of the filing fee, the application [petitioner's application] was without any force and effect—a mere nullity,

and not subject to any action, after the lapse of 30 days from the date of the alleged posting of notice, which could preserve the claim of preference right."

* * * * * *

* * * "Hardeman [petitioner] could have amended his application after it was filed by making it comply with the regulations, but the right of amendment did not extend beyond 30 days after November 11, 1923, the time within which he could pay the fee required by law and regulations, and without which payment his application was of no effect."

Pursuant to the last of the administrative decisions aforesaid a permit was issued to the respondent on May 6, 1925. The suit to have the respondent decreed a trustee of the permit for the petitioner was brought on May 22, 1925 (Rec. 123-127, 1-18).

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

As stated before, the district court did not file a written opinion. Nor did it file findings and conclusions; its decree having been granted before the effective date of Rule 70½ of the Equity Rules. However, that said court's decree was for the petitioner renders unquestionable that its opinion was that the General Land Office erred in matter of law, with resultant granting to the respondent of a permit to which the petitioner was entitled under a correct application of the pertinent law to the uncontested facts. Which means, of course, that the district court was not in agreement with the Secretary of the Interior that the petitioner's application,—"because not accompanied with any part of the filing fee,"—was "a mere nullity" and hence

not amendable in respect of verification thereof under oath. It may not be a useless repetition to again emphasize that the Interior Department did not ascribe nullity to petitioner's application because it was without intrinsic proof that oath thereto had been made, but that the departmental ruling was that nullity was an effect of non-accompaniment of the application with the requisite filing fee.

The opinion of the appellate court below, although in agreement with the administrative conclusion that the petitioner's application was a nullity, assigns as a reason or ground for the agreement a consideration entirely different from that assigned by the Secretary of the Interior, and holds that the reason or ground assigned by that officer was hardly tenable. In witness of this the following is quoted from that court's opinion:

> "The application was in fact filed, and the filing never expunged, and the fees were paid on notification.. We should hesitate to nullify the application on this ground." (Rec. 154).

And after so disapproving the basis assigned by the Secretary of the Interior for his conclusion that the petitioner's application was a "mere nullity", the appellate court below proceeded to conclude that it was a nullity for another and different reason, to-wit, that the application did not contain intrinsic proof that it had been executed under oath. On that matter the appellate court said:

> "Conceding that he [petitioner] was entitled to preference by having on November 11 gone upon the land and posted notice of his intention to apply, the preference lasted only for the thirty days next following, 30 U. S. C. A., sec. 221, and was lost unless a formal application was filed within that time" * * * "the oath was supplied in 1925, long after

> the thirty days had expired." * * * "the oath to the application was required by the statute itself, 30 U. S. C. A. 190, and by the special regulations made under it." * * * "By requiring it and all other statements to the Secretary to be upon oath," * * * "we think the statute, sec. 190, intended written papers and an oath disclosed by the paper filed" * * * "No other construction of the statute is practicable" * * * "Although ordinarily the omission of an oath can be supplied later, when the oath is made a condition of priority or advantage over another the amendment will operate only from its date. Since Hardeman [petitioner] filed no lawful application within thirty days from his posting of the land, he lost his priority right, and the permit was properly awarded to Witbeck" [respondent].

Whether it is the law,—as declared by the Secretary of the Interior,—that an application for a permit which is not accompanied with the required fee, is "a mere nullity" or whether, as remarked by the Fifth Circuit Court of Appeals, a court should hesitate to concur in and sustain such an administrative declaration of law, are questions of federal jurisprudence of general importance and of special concern to the considerable body of the public that is affected by the discharge of the quasi-judicial functions of the Secretary of the Interior in the administration of the public land laws.

It is a disagreement in a matter of law between a court of high rank in the federal judicial system and a branch of government of high rank in the federal executive department. While such disagreement is evident from the foregoing, it is more evident from the following excerpt from the opinion of the Secretary of the Interior in *Allen v. Pilcher, 51 L. D. 285* (decided nearly a year after ren-

dition of that department's decision in *Witbeck v. Hardeman* (On Reconsideration), *51 L. D. 36*, to wit:

> "It is true, section 33 of the act prescribed: 'that all statements, representations, or reports required by the Secretary of the Interior under this act shall be under oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require,' and the Secretary has specified that applications for oil and gas permits shall be under oath although no specific form of application is required. Oil and gas regulations, paragraph 4, Circular No. 672 (47 L. D. 437). The requirement of an oath to an application is, therefore, mandatory and no application is properly allowable unless it is verified by oath and so shown to be. An application under this act is not, however, a nullity or fatally defective because the evidence that it was sworn to does not appear thereon, if the oath was administered and that fact is later satisfactorily shown. The liberal policy of the several States in respect to amendments in judicial proceedings is followed by the Department in so far as amendments do not affect rights (Hiram T. Hunter, 2 L. D. 39). As a general rule where a statute prescribes no specific form of affidavit in proceedings or pleadings that have to be verified by oath, the fact that the oath was administered may be shown by extrinsic evidence and an affidavit, if in fact sworn to at the proper time and before the proper officer, is generally admitted by the courts where no rights are prejudiced. See Corpus Juris, Vol. 2, p. 260, note 52, and American Digest, Century Edition, Vol. 2, p. 45, for cases in point. The omission may have been due to an oversight or inadvertence on the part of a notary public to whom the paper was presented for certification. It is, therefore, within the sound discretion of the Department to permit the same to be shown if such was the fact."

The judicial decision under criticism here is irreconcilable with the aforesaid quasi-judicial decision in *Allen v. Pilcher, supra;* but if the former is not reversed the latter very probably will be observed and followed in the Department of the Interior. It has not been the practice of that department to yield its judgment to the judgment of a circuit court of appeals of the United States on a matter of law which the department regards as settled under its decisions and which, in this instance (i. e. with respect to the ruling in *Allen v. Pilcher, supra*), it has ample cause for conviction is thereby settled not only in consonance with its traditional conception of the law of amendment and the overwhelming weight of judicial authority, but in harmony with the ancient spirit of federal jurisprudence. (Section 32 of the original judiciary act).

In the light of the foregoing it would seem unnecessary to urge the less important of the reasons for granting certiorari, namely, that the district court below reached conclusions on matters of federal law diametrically the opposite of those announced by the appellate court below. However, if the latter court erred on the law of amendment of applications for permits to occupy the public lands for the prospecting of them for oil and gas, it would hardly be consistent with the purposes of the optional jurisdiction of this Court under the process of certiorari to permit that error to be perpetuated in the Fifth Circuit and cited with the possibility, at least, of propagation of it in other circuits.

But even if the appellate court below had not erred in its conclusion in the matter of the law of amendment of such applications, its reasoning to its conclusion, if ob-

viously influenced or constrained by authorities cited by it that were not only inapposite but appropriate for citation in support of a contrary conclusion, should not be allowed to stand unrevised or uncorrected by this Court. The interests of general jurisprudence would seem alone sufficient to induce this Court to revise or correct.

THE RATIONALE OF THE DECISION OF THE APPELLATE COURT BELOW.

The Fifth Circuit Court of Appeals clearly indicated that it was impelled to its conclusion that the petitioner's application was a nullity by what appears in section 33 of the so-called Leasing Statute and the 4th of the administrative regulations thereunder. (Oil and Gas Regulations, *47 L. D. 437, 438*). But in *Allen v. Pilcher, supra*, the Department of the Interior considered both that section and that regulation and reached a wholly different conclusion. The said section provides:

> "that all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him." * * *

The said regulation "specified" that any application for a permit "be under oath." However, the section of the statute that is creative of the "preference right," namely, section 13, neither expressly nor by necessary implication requires, as a condition precedent to the validity of an application filed with view to exercise and enjoyment of the right, that it shall be under oath. The section is without any reference whatever to an oath. And neither the 33d section, nor the 4th of the regulations, contains

any language indicative of a purpose to create any condition precedent whatever to the validity of an application so filed.

But it cannot fairly be said of the opinion of the appellate court below that therein there is an ascription to Congress of an intention to delegate to the Secretary of the Interior an authority to prescribe a condition precedent to the validity of the means,—an application,—which it prescribed as the only means whereby the "preference right" could be exercised. A *sine qua non* of validity of a pleading,—and an application for a permit to prospect is a pleading in a public land proceeding,—may be created by the law-making power, but such power is not competent to delegate authority to the Secretary of the Interior to create it. Hence the aforesaid 4th administrative regulation need not further be noticed.

And so, and necessarily, the opinion of the appellate court below is simply to the effect,— contrary to the effect of the opinion of the Department of the Interior in *Allen v. Pilcher, supra*,—that section 33 of the statute is not construable otherwise (the court said "no other construction of the statute is practicable," (Rec. 155) than that it rendered an oath to an application a condition precedent to the validity of the application, a *sine qua non* of its existence as a valid application. The corollary is, of course, that something null and void in law is not amendable.

It is true, of course, that a quasi-judicial discretion to allow amendments of pleadings in public land proceedings is vested in the Department of the Interior. But it does not follow from that proposition that an abuse of that

quasi-judicial discretion is not subject to correction by the judiciary when it is patent that its effect has been to deny a just claim of right under the law of the land. An unregulated power of discretion is non-existent in government under the Constitution and to allow amendments is the rule; to refuse them, the exception.

Neither the appellate court below, nor the trial court, nor the Department of the Interior, indicated doubt or question concerning the complete verity of the sworn and corroborated testimony of the petitioner that he had in fact been sworn to his application when filed. Throughout both the administrative and judicial proceedings in the controversy between the petitioner and respondent it was virtually admitted that such was the case. But the appellate court below regarded that unquestioned proposition of fact as immaterial, and did so with entire justification if it indeed be the law,—as otherwise held in *Allen v. Pilcher*, *supra*, however,—that section 33 of the statute requires that an application to exercise and enjoy the "preference right" be held to be "a mere nullity" unless within 30 days from acquisition of the "right" the application bears intrinsic proof of having been executed under oath.

Error in the decision of the appellate court below is specified as follows:

I. Error in deciding that the petitioner's application for a permit was a nullity because it was without intrinsic proof of having been executed under oath.

II. Error in deciding that the petitioner's application was not amendable to show the fact that it had been executed under oath when filed.

III. Error in failing affirmatively to decide that the validity of petitioner's application was unaffected by the fact that the fee required to be paid thereunder was not paid until December 19, 1923.

IV. Error in reversing the decree of the district court and in failing to affirm said decree.

WHEREFORE your petitioner prays that his petition for certiorari to the Circuit Court of Appeals for the Fifth Circuit be granted for such proceedings in this case by this Honorable Court as to it may seem just.

JACK HARDEMAN,
Shreveport, Louisiana.

By PATRICK H. LOUGHRAN,
Washington, D. C.,
Attorney for Petitioner.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

PATRICK H. LOUGHRAN.

SUPPORTING BRIEF.

The adjudications the appellate court below cited as authorities for its disagreement with the doctrine enunciated by the Department of the Interior in *Allen v. Pilcher, supra,* should be noticed. The first of them is *Lucas v. Pilliod Lumber Co., 281 U. S. 245,* wherein was presented the question whether the period limited by a special statute for the making of a deficiency assessment of income and profits tax begun to run from the date of the filing of an unsworn return which, however, the Bureau of Internal Revenue had relied upon for purposes of audit.

It was admitted by and on behalf of the taxpayer that the return had not in fact been sworn to when filed and that oath thereto was not made until several years after filing. The circumstance not only very sharply distinguishes that case from the instant case in the factual aspects of the two cases but is undoubtedly what justified this Court in permitting to stand without criticism or even express notice the following statement of general law by the Sixth Circuit Court of Appeals in the *Pilliod Lumber Co. Case, (33 F. [2d] 245),* to wit:

> "The statutory requirement that the return should be verified is, of course, made to be observed and is of importance; it does not follow that the document [the return], without the oath, is necessarily for all purposes a complete nullity."

The Pilliod Lumber Co. Case is clearly distinguishable from the instant case for other and equally obvious reasons. There the question was as to when a period of limitation had begun to run. But there never has been a question in the instant case as to when the period limited

for the filing of the petitioner's application for a permit began to run. All that this Court decided in the Pilliod Lumber Co. case was that a statute limiting the period for action by the United States to recover what was due to it, is effective as an abridgment of a power of government and must, therefore, not be so construed as to enlarge or extend the abridgment. This is evident from the following quotation from the opinion in the case:

> "Under the established rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here the assent that the statute might run was conditioned upon the presentation of a return duly sworn to."

No interest of the government is involved in the question whether a pleading in a quasi-judicial proceeding *inter partes* may be so amended as to show that it was in fact sworn to before it was filed.

To attempt to analogize the principles governing in the construction of a statute of limitation of the time of action by the United States for the assessment of a tax, to the principles underlying the law of amendment of a pleading in a quasi-judicial proceeding, is plainly to attempt to discover a similitude between things which all jurisprudence has rendered utterly dissimilar. It is axiomatic that a statute that limits or abridges the power of government to assess or to collect a tax, must be strictly construed. On the other hand it is a familiar truism that the law of amendment of pleadings filed with view to exercise and effectuation of the right of a person under the law of the land, must be liberally construed.

The alleged authority next in order of citation of authorities in the opinion of the appellate court below is *Steward v. American Lava Co., 215 U. S. 161.* That case involved a patent for an invention which was a different invention from that disclosed in the application. The fact that there had been issued a patent for something not disclosed in the application, was due to oversight or lack of understanding in the Patent Office in connection with a so-called amendment of the application. If the petitioner in the instant case had attempted to obtain under an amendment of his application for a permit something entirely different from a permit, e. g., a desert land entry, the American Lava Co. Case would be in point. A new and different objective under the application would have rendered necessary what this Court held to be indispensably necessary in the case cited, namely, another and new oath. But the petitioner in the instant case never sought, wittingly or unwittingly, by amendment or otherwise, to obtain under his application anything different from or unlike that referred to therein. Therefore, the decision of this Court in the American Lava Co. Case is pointless here.

The other putative authorities cited in the opinion of the appellate court below are even more inapposite. *Cohen v. Manco, 28 Ga. 87,* was decided in 1858. Therein was considered the question whether the absence of the signature of the plaintiff from what the court denominated a purported affidavit in support of an attachment, rendered the affidavit invalid. Notwithstanding, that there was a completed certificate by a notary public that the plaintiff had appeared before him and been sworn, it was decided that a document defective to that extent was not

amendable. Such a conclusion is typical of injustice perpetrated judicially. It is a conclusion that is inharmonious with the spirit of the law of amendment, besides being, as we shall show presently, antagonistic to the reasoning in an alleged authority cited by the appellate court below which might better have been cited on behalf of the petitioner.

In its citation of *Tacoma Grocery Co. v. Drahan, 8 Wash. 263*, the appellate court below relied upon a case enunciating a principle upon which petitioner might well rely. Therein it was decided that a sale of land under an execution was a "nullity" for a reason that the court that rendered the judgment pursuant to which the execution issued had not acquired jurisdiction. The holding that there was want of jurisdiction was predicated upon the fact that the attachment the plaintiff had sued out was not based upon an affidavit, but upon "a paper" * * * "in the form of an affidavit, signed by a person who represented himself as the attorney for the plaintiff, but there is nothing upon the face thereof to show that it was ever sworn to."

The Chief value of the Tacoma Grocery Company Case to the petitioner lies in the circumstance that the Supreme Court of Washington **decided** therein that it was competent for the plaintiff in the proceeding to quiet title to show, and for the lower court to have accepted the showing if deemed sufficient, that an oath had in fact been made to "the form of an affidavit" in support of the attachment and, upon such showing, to have sustained claim of title. This interpretation by us of the opinion in the Tacoma Grocery Co. Case is amply supported by

statements therein which we shall quote. But before doing so we call attention to the fact that the Washington Supreme Court declared *Wiley v. Bennett, 9 Bart. 581* and *Stout v. Folger, 34 Iowa 71*, distinguishable from the Tacoma Grocery Co. Case only because "there it was made clearly to appear to the court that the affidavit had been in fact sworn to, and it was held that as the required facts had been set forth in the form of an affidavit, and their truth vouched for by the oath of the party, he should not be deprived of his rights by reason of the inadvertent omission of the officer to sign the jurat."

It is evident from the following statements in the opinion in the Tacoma Grocery Case that if counsel for the company had been as alert and diligent as he should have been he would have adduced, if available, the evidence which the court held would have rendered the *Wiley* and *Stout* Cases apposite, and obtained an adjudication the opposite of the one made:

> "There is a point made in the appellant's brief that it should be relieved from the judgment by reason of the fact that it asked for an adjournment of the taking of proofs before the referee for the purpose of allowing it to produce, at the adjourned day, a witness to prove that the affidavit was in fact sworn to, and that the referee refused to grant such an adjournment. If the appellant had sought relief from the action of the referee by a sufficient showing before him and in the lower court upon the presentation of his report, and had been unable to obtain it, the court could grant such relief. But nothing of this kind was done" * * * "Upon the report of the referee, the case came before the court for trial; and, if the appellant felt that it had been denied an opportunity to introduce such proofs as

were necessary before the referee, it should have asked leave to introduce the same upon the hearing."

And so, and plainly, the Tacoma Grocery Co. Case, *supra*, is authority for the proposition that the Supreme Court of Washington would have granted "relief" if the lower court in that case had improperly refused to receive proof that the affidavit in the attachment proceedings had been sworn to when filed. The petitioner is content to abide the ruling made in that case under any accurate interpretation of the opinion filed therein.

The final one of the citations in the opinion of the appellate court below is *4 Cyc. 470.* The subject there treated is "Attachment". Under our view of the topic of jurisprudence which is germane to the question in the instant case, in which view we are convinced this Court will readily concur, we respectfully submit that any matter *at page 470 of 4 Cyc* is pointless and irrelevant, *a fortiori* when it is considered that at pages *522, and 523 of 4 Cyc* there appears the following statement in the text concerning affidavits in attachment:

> * * * "Errors in the date may be corrected or an affidavit newly dated substituted for one erroneously postdated, and the omission of affiant to affix his signature or a defective verification may be amended. If the contents of the affidavit be duly sworn to, but the officer who administered the oath neglects to add his certificate or signature he may be permitted to do so nunc pro tunc" et cet.

What has gone before contains a treatment of each of the so-called authorities relied upon by the appellate

court below. It is the same treatment of them that was made in the petition for rehearing which that court, to petitioner's great astonishment, refused to entertain. Petitioner also set out in such petition for rehearing the excerpt from *Allen v. Pilcher, 51 L. D. 285*, which is embodied in this petition for certiorari. Hence the appellate court below was afforded an opportunity of conforming its final views on the law of amendment of applications for oil and gas prospecting permits to the final views thereon expressed by the officer of the United States charged with the administration of the so-called Leasing Statute. The said court chose to adhere to its views and thereby to create a conflict between it and the Department of the Interior, for determination by this Court.

And the appellate court below has erred so plainly in creating the conflict, that further discussion of the case in the matter of amendment of an application that is without intrinsic proof of execution thereof under oath, is wholly unnecessary in this presence. However, that the appellate court below, and not the Department of the Interior, is sound in judgment on the effect of the brief delay in payment of the fee which the law required to be paid under petitioner's application for a permit, is equally apparent. The appellate court below possibly made a closer study of Cyc with reference to the effect on a pleading of reception and filing of it without payment of a required fee, than was made with reference to that work's treatment of the matter of an oath to papers filed in attachment proceedings. In any event, the ruling of the appellate court below that the Interior Department was wrong in the basis it assigned for its ruling that the petitioner's appli-

cation was "a mere nullity", is at variance with the following excerpt from 31 Cyc at 591:

> "A statute making the payment of a fee a prerequisite to filing a pleading is directory only, and a failure to pay the fee does not render the filing invalid; and the same is true of an order containing leave to file on payment of costs."

THE PREMISES CONSIDERED we submit that cause has been shown for the taking of jurisdiction of the instant case by this Honorable Court under the process of certiorari, and for a decision therein by this Honorable Court reversing the decree of the appellate court below.

Respectfully submitted;

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